Pregnancy, Parenting, and Capitalism

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Judicial decisions in the United States have been hostile to discrimination claims by pregnant women. Rejecting the notion that pregnancy-based discrimination is sex-based, United States courts have refused to consider such discrimination as part of the law of sex discrimination.[1] Other countries, such as Canada, have incorporated pregnancy discrimination cases into the law of sex discrimination. Since the Pregnancy Discrimination Act ("PDA")[2] was passed to specify that pregnancy-based discrimination in employment should be considered to be sex-based discrimination, some United States courts have imposed impossible burdens of proof on female plaintiffs.[3] Other courts have used the PDA as an opportunity to rule for male plaintiffs, overturning special treatment rules for pregnant women.[4] United States antidiscrimination law has not provided pregnant women with much substantive protection irrespective of

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[1] *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976), *superseded by* Pregnancy Discrimination Act, Pub. L. No. 95-555, 95 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)). By contrast, the Canadian Supreme Court has recognized that pregnancy-based discrimination is sex discrimination. *See* Brooks v. Canada Safeway Ltd. [1989] 59 D.L.R. 4th 321, 322 (B.C. Ct. App.) (finding disability benefit plan which denied benefits to pregnant women violative of sex-equality principle).

[2] Pregnancy Discrimination Act, Pub. L. No. 95-555, 95 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)). The PDA states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k).

[3] *See, e.g.*, Troupe v. May Dep't Stores, 20 F.3d 734, 738–39 (7th Cir. 1994) (finding against plaintiff because she could not produce comparative evidence of a man who had had tardiness problems before a period of scheduled leave was to commence).

[4] *See, e.g.*, Schafer v. Board of Educ., 903 F.2d 243, 248 (3d Cir. 1990) (finding collective bargaining agreement that permitted a woman to take up to one year of leave following the birth of a child violative of the PDA because the leave was not available to men).

the content of such laws, especially when cases have been decided by judges who are sympathetic to the law and economics school of jurisprudence.

United States law also does little to protect fetuses from hazards at the workplace while women are pregnant. Federal antidiscrimination law requires no accommodations for pregnant women. Interpretations of the PDA combined with interpretations of the Occupational Safety and Health Act ("OSHA")[5] have resulted in no meaningful federal guidelines to make the workplace safe for fetuses. We have allowed the private marketplace to set standards in this area. Canada and Western Europe, by contrast, have found ways to accommodate both the health of the fetus and the rights of the pregnant worker.

Finally, the United States stands alone in the western world in its failure to require employers to provide paid leave to parents following the birth of a child.[6] Until quite recently, women could be fired who took unpaid, medical leave following the birth of a child. After almost a decade of political struggle[7] to pass the Family and Medical Leave Act ("FMLA"),[8] parents who work for large employers are now entitled to twelve weeks of unpaid leave following the birth or adoption of a child.[9] This statute provides few genuine options for the overwhelming number of poor, or even middle-class women, who cannot afford to take unpaid leave and still pay the bills. Their only solace is that, if they work for a large employer, they, at least, will have a job to which they can return after taking the most minimal possible medical leave.

The limited protections that do exist for pregnant women in the United States have received strong criticism from the theorists in law and economics.

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[5] Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (1994).

[6] Until 1993, of the industrialized countries, only South Africa and the United States failed to have a federal maternity or parental leave policy. *See* Carol Daugherty Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT'L L. 105, 105 (1994).

[7] The FMLA has its origins in congressional legislation introduced in 1985. After numerous revisions and reincarnations of these proposals for employee leave, Congress passed two versions of a family leave act, both of which were vetoed by President Bush. Congress began discussion of the current Family and Medical Leave Act in January 1993, and approved it on February 3, 1993. President Clinton signed the Act on February 5, 1993, and it became effective for most employers on August 5 of the same year.

Nancy R. Daspit, Comment, *The Family and Medical Leave Act of 1993: A Great Idea but a "Rube Goldberg" Solution?*, 43 EMORY L.J. 1351, 1354–55 (1994) (citations omitted).

[8] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601–2654 (1994).

[9] Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a) (1994).

Commenting on the general issue of legally imposed special treatment for pregnant women under antidiscrimination law, Professor Richard Epstein says:

> Because pregnancy is desired, and because women largely control whether and when to become pregnant, the evident moral hazard makes pregnancy a poor candidate for any form of insurance.
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> . . .
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> . . .The legislative and judicial insistence on [the antidiscrimination laws'] special status, however, cannot obscure the social losses incurred by their implementation, with pregnancy as elsewhere.[10]

Epstein wrote those words in response to the use of antidiscrimination law for the benefit of pregnant women; one can only imagine what he might say about a blatant preferential treatment policy like the FMLA.[11]

Economic discourse has dominated the discussion of the treatment of pregnant women in the United States. Does tying welfare benefits to family size cause poor women to bear more children?[12] Would mandated insurance coverage, paid leave, or accommodations for pregnancy bankrupt businesses?[13] Based on little empirical data, but much speculation by law and economics gurus, the free market proponents have largely won the debate in the United States. Any scheme of pregnancy-related benefits or accommodations is largely a matter of bargaining between employees and employers. The government has imposed few standards in this area.

This discussion is uniquely American in two ways. First, it is dominated by the economic discourse of extreme laissez-faire economics.[14] Second, it

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[10] RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 329, 349 (1992).

[11] Epstein criticizes the PDA as using the antidiscrimination norm as a tool for redistributive ends. *See id.* at 349. Obviously, the FMLA could also be described in such terms.

[12] While the United States seeks to limit the amount of financial support to poor women with children through passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996), many European countries continue a subsidization program for all families with children. For example, Germany provides monthly benefits of approximately $395 per month to the family until the child reaches six months, and then provides a somewhat reduced benefit until the child reaches twenty-four months. Another program then provides a subsidy until the child reaches the age of seventeen (twenty-seven in case of disability). *See* Rasnic, *supra* note 6, at 143.

[13] *See infra* Part I.

[14] For an excellent discussion of capitalism in the United States in comparison with capitalism in Western Europe and in Japan, see LEONARD SILK & MARK SILK, MAKING CAPITALISM WORK (1996).

virtually ignores the needs and interests of young children.[15] Health insurance for pregnant women results in increased access to prenatal care which, in turn, reduces the incidence of low birth-weight-babies.[16] Paid leave for parents facilitates breast feeding and parental care for the first year of a child's life. Ample evidence exists that virtually all forms of nonparental care in the first year of life are inferior to the care offered by good parents.[17] Yet, the United States has taken no steps to improve the quality of nonparental care offered to infants or to help parents to be able to afford to provide infant care themselves. As I will argue in this Article, this second problem may also be attributed to the ill effects of laissez-faire economics on American life. The free market, autonomy principles underlying American capitalism cause us not to be "other-directed" in our consideration of social problems. It is as if we forget that pregnant women frequently give birth at the end of their pregnancies. The short period of medical leave which they might receive after the birth of a child does not even begin to address the needs of the infant who has just been born and is in his or her most dependent, and possibly most important, stage of development.

The discourse in other countries, even other capitalistic countries, has been vastly different. The needs of pregnant women are built around the understanding that a child will soon be born who needs special assistance. When a society offers assistance to parents in the form of paid leave, insurance, or accommodations away from workplace hazards, the real beneficiaries of that assistance should be considered the *child* not the pregnant woman. The whole "special treatment" debate in the United States has been warped by a misunderstanding of who receives and needs that special treatment—the child.

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[15] Even when authors make arguments for why men should have more access to parental leave, they couch their arguments from the perspective of how such leave benefits the parents—giving men an opportunity to develop parenting skills and alleviating women's disproportionate child care burden—rather than from the perspective of how such leave benefits the children. *See, e.g.*, Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994).

[16] *See* Jeanette H. Johnson, *U.S. Differentials in Infant Mortality: Why Do They Persist?*, 19 FAM. PLAN. PERSPT. 227, 231–32 (1987).

[17] *See generally* ALISON CLARKE-STEWART, DAYCARE 116–21 (1993 rev. ed.) (surveying research on whether infants should be in daycare at all); EDWARD F. ZIGLER MARY E. LANG, CHILD CARE CHOICES: BALANCING THE NEEDS OF CHILDREN, FAMILIES, AND SOCIETY 83 (1991) (reporting Jay Belsky's research that infants who experience more than twenty hours per week of supplementary child care in the first year of life are at risk of developing insecure attachments and later social-emotional problems); Mackenzie Carpenter, *U.S. Lags on Parental Leave Policy*, PITT. POST-GAZETTE, June 3, 1996, at A-9 ("Most experts say that the best thing for children would be for parents to remain home with them for the first four to six months; others say a year would be better.").

Historically, it has always been problematic that we lump "women and children" together in our discourse as if they are a unitary entity and as if the woman, herself, needs paternalistic protection. This tradition continues in our modern discourse about pregnancy discrimination and pregnancy leave. In this Article, I will attempt to separate out the needs of pregnant women and children to argue that special treatment is and should be offered to the newly born child (or the fetus in utero). It is conceptually wrong to view that treatment as having been extended to the pregnant woman.

I. THE ECONOMIC DEBATE

Economic discourse has dominated the arguments both for and against paid parenting leave and health insurance coverage for pregnant women.[18] Richard Epstein's discussion of mandated insurance coverage for pregnant women rests entirely on economic arguments concerning the stability of voluntary insurance systems. He argues that disability insurance systems will inevitably "disintegrate" if coverage for pregnancy is required; therefore, it is in everyone's interest to exclude pregnancy in order to maintain the viability of the insurance disability market.[19] Any insurance system which covers pregnancy should falter under his economic analysis because women would choose to become pregnant and take advantage of these programs, thereby creating a substantial increased cost which would undermine the economic viability of such systems. Epstein's arguments are entirely theoretical—he offers no empirical support connecting the availability of any of these benefits and women's behavior. His theoretical arguments are based on his initial assumption that: "pregnancy is desired, and . . . women largely control whether and when to become pregnant."[20]

The *Wall Street Journal*, a bastion of American capitalism, regularly publishes editorials ridiculing the FMLA with headlines such as "Family-Leave Law Can Be Excuse for a Day Off."[21] These articles complain that the $674 million price tag for the statute, as predicted by the General Accounting Office, will be much higher in practice.[22] Taking a somewhat different slant, Professor

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[18] *But see* Elizabeth Fox-Genovese, *Feminism, Children and the Family*, 18 HARV. J.L. & PUB. POL'Y 503 (1995) (arguing that we need to develop adequate parenting leave policies to demonstrate our commitment to children).

[19] *See* EPSTEIN, *supra* note 10, at 334–40.

[20] *Id.* at 329.

[21] Joann S. Lublin, *Legal Beat: Family-Leave Law Can Be Excuse for a Day Off*, WALL ST. J., July 7, 1995, at B1; *see also* Editorial, *Taking Leave*, WALL ST. J., Apr. 17, 1995, at A12; Gary Klotz, *Regulatory Chokehold: The High Cost of "Employees Rights,"* WALL ST. J., Aug. 3, 1993, at A14.

[22] *See* Klotz, *supra* note 21, at A14.

Maria O'Brien Hylton argues that the costs of unpaid parental leave legislation will be visited primarily on low paid female workers who cannot afford to take such leave and who face the highest risk of being laid off if the FMLA imposes substantial costs on employers.[23]

Judge Richard Posner has made no secret of his hostility to the PDA and mandated maternity leave in his academic writings. Posner argues:

> The requirement that the employer not differentiate among its employees on the basis of pregnancy is analytically the same as a requirement that the employer pay the same retirement benefits to male and female employees despite women's superior longevity, or a requirement that the employer grant maternity leave (in other words, agree to reinstate female employees who take time off to have or take care of their babies). In all three cases, the law compels the employer to ignore a real difference in the average cost of male and female employees. The result is inefficient, but a more interesting point is that it may not benefit women as a whole.[24]

Posner acknowledges at the end of his article that the cost of laws such as the PDA may be offset "by gains not measured in an economic analysis—gains in self-esteem."[25] Never does he consider, however, whether the benefits of such laws might be measured in the well-being of our next generation.[26] And, not surprisingly, as we will soon see, Posner's hostility to the PDA is reflected in his decisions as a jurist.[27]

Arguments in support of increased benefits for pregnant women also often speak in purely economic terms. For example, Samuel Issacharoff and Elyse Rosenblum cite President Clinton's "nannygate" episode in trying to find a qualified (female) Attorney General as exemplifying the need for a national

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[23] *See* Maria O'Brien Hylton, *"Parental Leaves" and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 493 (1991).

[24] Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332 (1989).

[25] *Id.* at 1335.

[26] His failure to consider this argument is somewhat surprising because he does seem imbued with romantic notions of women's maternal role. For example, he states earlier in the article:

> It is possible that the greater propensity of women than men to take time out of the labor force is itself a product of sex discrimination, but I am skeptical of that proposition—I think child-rearing is an area where nature dominates culture—and I do not accept it for purposes of my analysis.

Id. at 1315.

[27] *See infra* notes 83–94 and accompanying text.

maternity policy that can accommodate the needs of working women.[28] They argue: "[W]ithout accommodation for pregnancy, women experience an elevated level of early departure from the work force and an associated failure to develop what economists term job specific capital—that is, the enhanced skills and productivity that come from experience on the job."[29] Exploring the relationship between wages and continuous workplace participation, they argue that the United States needs a model similar to the one employed in Canada whereby women receive unemployment insurance for twelve weeks post-partum so long as they had worked for their employer for at least ten weeks before becoming pregnant.[30] Like Epstein, they base their proposal on empirical evidence connecting women's childbearing decisions and the availability of insurance systems. But, unlike Epstein, they conclude that "there is no evidence that women are likely to have children specifically to collect pregnancy leave benefits."[31] Having begun with a different premise, they arrive at a different economic solution.[32]

Issacharoff and Rosenblum's program would certainly create an improvement in women's economic situation following the birth of a child but is unlikely to have any appreciable impact on the "nannygate" problem that they used to introduce their article. The women with "nanny" problems were not impeded in their careers by a lack of compensation for twelve weeks of pregnancy leave.[33] Understanding the importance of continuous workplace

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[28] Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2154 (1994); *see also* Mikel A. Glavinovich, *International Suggestions for Improving Parental Leave Legislation in the United States*, 13 ARIZ. J. INT'L & COMP. LAW 147 (1996) (offering economic arguments for mandating adequate parental leave).

[29] Issacharoff & Rosenblum, *supra* note 28, at 2156.

[30] *See id.* at 2217–18.

[31] *Id.* at 2216.

[32] My survey of the existing statistics on birth rates, pregnancy leave policies, and women's participation in the workforce suggests no strong connection between women's childbearing decisions and the availability of insurance systems. Germany and Italy, for example, which I cite above as having generous pregnancy-based policies, also have the lowest birth rates in Europe (10 per 1000 population) as compared to the United States' relatively high birth rate (16 per 1000 population). *See* GEORGE THOMAS KURIAN, THE NEW BOOK OF WORLD RANKINGS 21 (3d ed. 1991).

[33] Kimba Wood had hired an illegal alien from Trinidad in March of 1986 to care for her infant son. The employment was actually lawful because federal law at that time permitted illegal aliens to be hired in such positions. The sitter became a legal resident in 1987, allowing Wood to continue to employ her legally. Wood also paid all required Social Security taxes on the sitter's wages. The sitter worked for the family for many years, permitting both Wood and her husband to continue working in time-consuming and lucrative paid employment. *See Second Attorney General Candidate Withdraws over Alien Hiring*, FACTS ON FILE WORLD

participation to success in high-powered careers, these women took a minimal break from the workplace following the birth of their children. Their nanny problems were caused by the limited options available to them for high-quality care for their children after they returned to paid employment. Like many parents throughout the world, they concluded that a group child care situation was not appropriate in the first year or so of their child's life. That left them with two choices: have the parents work out a schedule that permitted them to stay home with the child or hire someone else to come into the home to take care of the child. Either option is much more expensive for most parents than group daycare yet many parents make the (uneconomical) decision to use one of these arrangements. Why?

Law and economics gurus must be scratching their heads to figure out the answer. Parents, who supposedly make decisions to have children depending on the disability insurance scheme available for the six weeks following the birth of the child, are also making blatantly uneconomical decisions—they are paying upwards of $1000 per month for someone else to take care of their child or foregoing at least that much money in income by taking care of the child themselves rather than paying about $500 per month for group care for their child.[34] The answer is that parents do not make child care (or pregnancy) decisions on a purely economic basis. If they did consider economics seriously, most adults, of course, would forego parenting altogether. But even after having decided to partake in the psychic and emotional rewards of parenting, they do not always even seek to minimize the costs of parenting. They sometimes choose highly uneconomical options in the early years of a child's life out of their concern for the child's well-being. That enduring fact will survive any tinkering with a paid-leave policy in the United States, such as the one offered by Issacharoff and Rosenblum. It will endure because, even in this highly capitalistic society, parents are motivated by forces other than economics.

NEWS DIG., Feb. 11, 1993, at 80A1. Wood's problems could best be described as a reaction against her decision to hire a non-American. Her career, however, was certainly not impeded, as Issacharoff and Rosenblum suggest, because she could not take sufficient medical leave following the birth of her son. Zoe Baird (and her husband) similarly hired a foreign couple as a babysitter and driver for a lengthy period of time. The foreign couple obviously was alleviating the burdens of combining paid employment and child care but their presence was not for the purpose of alleviating a short-term need for medical leave following the birth of a child. *See generally* Annie Nakoa, *Families Strain for Child Care*, S.F. EXAMINER, Jan. 26, 1993, at B-1.

[34] *See* Nakao, *supra* note 33, at B-1 (reporting that in-home care can cost up to ten dollars per hour and that, at a preschool center, infant care averages $632 per month and care for children between two and five averages $472 per month).

Poor women's decisions can also be understood as reflecting decisions about child care rather than economics. Some working class women, who earn minimum wage salaries, find that it makes more sense to quit their jobs and go on welfare after the birth of a child than to stay at paid employment. With the inadequate system of child care and health insurance that is available to poor women, staying at home to raise their child is the only way to safeguard their child's well-being. Their decisions are parallel to the decisions sometimes made by upper-class women—they choose an uneconomical option in order to safeguard the well-being of their children. The language of the welfare debate, however, condemns them as bad mothers without understanding the rationality of their decisions from the perspective of the child's well-being.[35]

The proposal offered by Issacharoff and Rosenblum, in fact, has few similarities with the actual scope of leave benefits available in Canada. In Canada, the federal Unemployment Insurance Act provides fifteen weeks of maternity benefits for the biological mother and a ten-week parenting benefit which can be taken by either parent.[36] Canadian parents thus receive compensation for nearly six months of leave following the birth of a child, not the twelve weeks proposed by Issacharoff and Rosenblum. Under the Federal Unemployment Insurance Act, parents can also take their benefits on a part-time basis, spreading them out over a fifty-two-week period.[37] Finally, a portion of this leave is available to either parent; the justification is not simply the biological needs of the pregnant woman. The effect of the Canadian legislation is to help make it possible for parents to care for their children themselves for the first six months, and possibly first year, of their child's life. It is the interests of the young child, not the pregnant woman, that justifies such a lengthy leave period for either parent.

European law is often comparable to the law of Canada in facilitating parents to take paid leave for much of the child's first year of life. For example, Italy passed the Equal Treatment Act in 1977 which built on the pre-existing 1971 maternity law and provided the following benefits to new parents: three-months leave for the mother at eighty-percent pay after the birth or adoption of a child and an optional six-month additional leave which could be taken by

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[35] *See generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

[36] *See* Unemployment Insurance Act, R.S.C., ch. U-1, § 11(3)(a) & (b) (1991) (Can.). Each province also has its own parallel statute governing unemployment insurance for maternity and parental leave. In Ontario, for example, the Employment Standards Act provides that a woman is entitled to take seventeen weeks of pregnancy leave and either parent is entitled to take eighteen weeks of parental leave. *See* Employment Standards Act, R.S.O., ch. 137, § 38(1) (1986) (amended 1990) (Can.).

[37] *See* Unemployment Insurance Act, R.S.C., ch. U-1, § 18(7) (1991) (Can.).

either parent at thirty-percent pay.[38] New mothers were also provided with guaranteed rest periods during the first year of a child's life.[39]

Due to legal action in 1987, the Italian law was soon equalized to provide more comparable benefits for male and female parents. Plaintiffs were fathers of newborn children whose mothers had died in childbirth or were infirm and immobilized; these men successfully argued that they, too, should be entitled to the three month post-partum leave and rest periods in accordance with the law of equal treatment.[40] In ruling for the male plaintiffs, the Constitutional Court noted that the rationale of the maternity law reflected a growing public concern for the child's affective and psychological well-being as well as its biological needs. Although the maternity law may have been initially passed in 1950 out of a concern for the frailty of pregnant women and a desire to facilitate breast feeding, its current structure reflects an increasing concern for the welfare of the young child.[41] As a result of another legal challenge in 1991, by a father whose wife was healthy but did not desire to take the three-month leave to care for the child, the Constitutional Court again ruled that the statute's protections must be extended to fathers. The Court recognized that the purpose of the legislation was to address the "relational and affective needs that are connected to the development of the personality of the child."[42] The purely biological justifications for the legislation were outmoded.

Nearly every European country provides women with at least eight weeks of paid leave following the birth of a child which is then followed by a period of paid parental leave.[43] It is clear from the language of these statutes that even the maternity leave is justified, in part, by the needs of the child. For example, in Austria, Germany, Norway, Poland, and Luxembourg, maternity leave is lengthened if the baby is born prematurely or the woman has a multiple birth.[44] Some countries, like Poland, also lengthen the maternity leave if there is

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[38] *See* Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CALIF. L. REV. 531, 536–53 (1993) (providing an excellent description of Italian law).

[39] *See id.* at 543.

[40] *See id.* at 549.

[41] *See id.* at 549–51.

[42] *Id.* at 551–52 (quoting Judgment of July 15, 1991, Corte Cost., 114 Foro it. I 2297, 2298 (1991)). The Canadian courts have similarly extended benefits to fathers on equality grounds. *See* Schachter v. Canada [1992] 93 D.L.R. 4th 1, 32 (Can.).

[43] *See* Rasnic, *supra* note 6, at 113–35 (summarizing European countries' maternity and parental-leave policies).

[44] *See id.* at 113, 118, 124, 126, 128.

already another child in the household.[45] And, unlike the United States, none of the European countries exempt small businesses from statutory coverage.[46]

Suggestions that the United States require paid leave following the birth of a child produces this kind of reaction from economic conservatives:

> What we need is another welfare scheme, this one for job holders. What a concept.
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> Now, push the baby carriage down to the FMLA office and pick up your "wage replacement" check once a week for the next three months. Maybe they'll electronically mail it to your banking account. Is this country great, or what? Insane, comes to mind.[47]

By contrast, Professor Edward Zigler, who unsuccessfully attempted to push a bill through Congress would have required a six-month paid leave for new parents, describes the FMLA act as awful. "'It's especially awful when you stop to consider that Ghana has a paid leave; Haiti has a paid leave, for God's sake. When are we going to join the rest of the world?'"[48] Your version of what's insane seems to depend on your view of economics and consideration of the well-being of children. Only in the United States is mandated, paid leave following the birth or adoption of a child considered to be insane.

II. SPECIAL TREATMENT/EQUAL TREATMENT DISCOURSE

A second key aspect of the pregnancy debate in the United States has been its focus on the special treatment/equal treatment issue.[49] The question that has been posed for nearly a century is: Will mandated leave legislation following the birth of a child help or hinder women's position in society? This argument, like the economic argument discussed above, has largely ignored the needs and interests of the young child. It is presumed that the *woman* rather than the fetus or young child is receiving the special treatment.

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[45] *See id.* at 128.

[46] *See id.* at 135.

[47] Nickie McWhirter, *Good, Bad News on Family Leave Act*, THE DETROIT NEWS, May 11, 1996, at C6.

[48] Carpenter, *supra* note 17, at A-9 (quoting Edward Zigler, Yale University psychologist).

[49] *See generally* Linda J. Kreiger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984–85).

A. *Pregnancy Leave*

The PDA has generally been interpreted to incorporate an equal treatment rather than a special treatment model. In doing so, the PDA sometimes helps prevent overt discrimination against pregnant women, but never helps accommodate the needs of the child following birth. A case that reflects this pattern is *Maganuco v. Leyden Community High School District 212*.[50] Plaintiff Maganuco was a pregnant school teacher who wanted to use her accumulated paid sick leave before taking an unpaid maternity leave. School policy forbade an individual who took maternity leave from combining it with paid sick leave.[51] She argued that this rule violated the PDA by creating a disparate impact against women in the workplace.[52] Drawing a distinction between plaintiff's medical needs and her child care needs, the court ruled against the plaintiff:

> Teachers who choose not to take maternity leave, and decide instead to return to teaching as soon as their period of pregnancy-related disability ends, are unaffected by the policy that Maganuco challenges. The impact of the leave policy that Maganuco contests, then, is dependent not on the biological fact that pregnancy and childbirth cause some period of disability, but on a Leyden schoolteacher's choice to forego returning to work in favor of spending time at home with her newborn child. However, this choice is not the inevitable consequence of a medical condition related to pregnancy, and leave policies that may influence the decision to remain at home after the period of pregnancy-related disability has ended fall outside the scope of the PDA.[53]

The Seventh Circuit's description of Maganuco's choice to stay home with the newborn makes it sound like she is staying home to engage in optional play activity. (Maybe the court should also have mentioned her choice not to relinquish the child for adoption so that she would not incur child care needs at all.) Earlier in the opinion, the court described her as needing only ten days of post-delivery recuperation to recover from her pregnancy.[54] Purportedly, she should then have returned to work full-time, although no daycare center will even consider taking a child until he or she is at least six weeks old. Once ten days have passed, and her medical needs have purportedly ended, the PDA's concern for her treatment at the workplace expires. This uncaring and callous consideration of the needs of the newborn is entirely possible in the equal

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[50] 939 F.2d 440 (7th Cir. 1991).

[51] *See id.* at 442.

[52] *See id.*

[53] *Id.* at 444–45.

[54] *See id.* at 442.

treatment regime of the United States, in which we can disregard that most pregnant women give birth to a child who will have significant parental child care needs.

Even when the PDA was flexibly interpreted to arguably accommodate special treatment, it did so under the guise of considering only the needs of the pregnant woman. The facts were distorted to hide the actual benefits to the child. In *California Federal Savings & Loan Ass'n v. Guerra*,[55] the United States Supreme Court was faced with the question of whether California's Fair Employment and Housing Act was inconsistent with the PDA[56] by requiring that California employers provide women with four months of unpaid disability leave following the birth of a child even if they did not offer disability leave for any other condition. The case was dubbed a special treatment case because California was requiring that a benefit be provided to (formerly) pregnant women that was not provided to other employees.[57]

The United States Supreme Court interpreted the PDA to permit such special treatment while also defining the special treatment narrowly to include only the interests of the pregnant woman. "We emphasize the limited nature of the benefits § 12945(b)(2) provides. The statute is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions."[58] The language of the statute and facts of the case, however, are inconsistent with this interpretation of the statute. The statute required up to four months of leave following the birth of a child, which it termed disability leave. Yet, there was no requirement that the woman provide medical certification for this leave.[59] The Ninth Circuit's opinion reflects that Lillian Garland took a four-month pregnancy disability leave, but contains no evidence that she had a medical reason for four months of leave.[60] Of course, it is possible that she had substantial medical complications following the birth of her child; however, it is far more likely that she could not find any suitable alternative child care arrangement for that time period and decided that it was in the best interest of the child for her to stay home and engage in that care herself. Interestingly, the Seventh Circuit

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[55] 479 U.S. 272 (1987).

[56] *See id.* at 274–75. The case was technically a Supremacy Clause case which means that the Court had to determine whether it was possible to comply with both the PDA and state law. *See id.* at 281–84.

[57] *See id.* at 284.

[58] *Id.* at 290 (emphasis in original).

[59] *See id.* at 275 n.1 (citing CAL. GOV'T CODE ANN. § 12945(b)(2) (West 1980 & Supp. 1986)).

[60] *See* California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 392 (9th Cir. 1985), *aff'd*, 479 U.S. 272 (1987).

presumed that women need only ten days to recover from childbirth while the Supreme Court engaged in the fantasy that it takes women's bodies four months to recover from childbirth. By indulging in that fantasy, the Supreme Court ignored a likely rationale of the California statute—to facilitate child care in the first four months of a child's life. Thus, the Supreme Court's special treatment holding ignored those who are the real beneficiaries of special treatment —children.

Canadian courts have not been mired down in the special treatment/equal treatment debate when confronted with fact patterns analogous to *Maganuco*. For example, in *Alberta Hospital Ass'n v. Parcels*,[61] the Alberta Court of Queen's Bench was confronted with the question of whether it was discriminatory to deny sick-leave benefits to women who were on maternity leave. Sick-leave benefits were somewhat more generous than maternity benefits; but, as in the *Maganuco* case, employees were not allowed to use maternity and sick-leave benefits sequentially. An employee had to choose one benefit or another.[62] Plaintiff Susan Parcels had elected maternity benefits because they were longer in duration, but wanted to take advantage of sick-leave benefits for that period of her maternity leave during which she was physically incapacitated.[63]

The Alberta court found that Parcels did have a valid claim of sex discrimination because the employer's policy posed a burden to women at the workplace. The employer was not entitled to consider maternity leave as only an example of general nonhealth-related leave without recognizing its unique health-related aspects.[64] The court ruled that maternity leave "cannot be neatly pigeon-holed because of its hybrid nature . . . . It is a unique situation. As a result, maternity leave should be removed from the leave of absence article in the collective agreement and placed in a category by itself."[65] Rather than adopt a comparative approach, the Alberta court analyzed the situation from the perspective of the well-being of both women and children in society. "[T]hose who bear children and benefit society as a whole should not be economically or socially disadvantaged by this activity . . . . [I]t is unfair to impose all of the costs of procreation on one-half of the population. The function of anti-discrimination legislation is to remove this unfair burden from women."[66] Rather than view the case as one of special treatment for women, the Alberta court viewed the case as achieving the appropriate apportionment of the

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[61] [1992] 90 D.L.R. 4th 703 (Alta. Ct. of Queen's Bench).

[62] *See id.* at 709.

[63] *See id.* at 704.

[64] *See id.* at 711.

[65] *Id.*

[66] *Id.* at 709.

burdens of bearing children. Women will still be the ones who undergo the physical and emotional burdens of pregnancy, but the *Parcels* decision helps spread those burdens throughout society.

B. *Protecting the Fetus During Pregnancy*

In the cases that have directly raised the issue of the health of fetuses—cases involving reproductive hazards at the workplace—United States courts have amazingly managed to decide these cases without really providing any meaningful protection to fetuses. These cases have required the courts to interpret OSHA or the PDA. In *Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.*,[67] the D.C. Court of Appeals, consisting of Judges Bork, Scalia, and Williams, ruled that American Cyanamid did not violate OSHA by creating a rule that female employees of childbearing age could not hold jobs that exposed them to high levels of lead exposure unless they could show that they had been surgically sterilized. Because surgical sterilization is a medical procedure that can be physically harmful to a woman, the Occupational Safety and Health Administration had found that American Cyanamid had violated the general duty clause of OSHA[68] by failing to "'furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees.'"[69] An administrative law judge vacated the Occupational Safety and Health Administration's finding and the Occupational Safety and Health Review Commission affirmed the administrative law judge on the ground that the policy in question was not cognizable under OSHA.[70] The D.C. Court of Appeals affirmed the decision of the Occupational Safety and Health Review Commission:

> An employee's decision to undergo sterilization in order to gain or retain employment grows out of economic and social factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or controls work processes and materials. For these reasons we

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[67] 741 F.2d 444 (D.C. Cir. 1984).

[68] 29 U.S.C. § 654(a)(1) (1994).

[69] Oil, Chemical and Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444, 447 (D.C. Cir. 1984) (citing 29 U.S.C. § 654(a)(1) (1982) and quoting Occupational Safety and Health Administration citation).

[70] *See id.* at 445.

> conclude that the policy is not a hazard within the meaning of the general duty clause.[71]

Like the Seventh Circuit's decision in *Maganuco*, the D.C. Circuit held that women's choices cannot subject employers to legal liability. As the plaintiff Maganuco could have chosen to return to work ten days after giving birth without jeopardizing her employment situation, the plaintiffs in *American Cyanamid* could have chosen to seek employment elsewhere rather than jeopardize their health through a sterilization operation. Employers are not responsible for the child care problems of a newborn infant or the health consequences of sterilization. So long as women have genuine choices, we cannot hold employers responsible for the social consequences of their decisions.

Because the *American Cyanamid* decision tolerated the exclusion of women from the workplace as a solution to the problem of reproductive hazards, it set the stage for a PDA challenge to this policy. Amazingly, the Supreme Court managed to decide the PDA case without considering the health interests of the fetus at all. In *International Union v. Johnson Controls*,[72] the Supreme Court ruled that Johnson Controls violated the PDA by excluding women with childbearing capacity from lead-exposed jobs. That result seems appropriate under the United States perspective, which tries to ignore that pregnant women will usually give birth to a child. Federal antidiscrimination law requires us to view the pregnant woman in isolation from the fetus or newborn child. Thus, the Supreme Court can rule that employers may not exclude women from the workplace out of concern for women's reproductive health, while not providing women with any genuine, acceptable, and safe options at the workplace. After *Johnson Controls*, a woman must choose between unemployment and working in an environment where she might expose a fetus to harm. The employer is under no obligation to accommodate the needs of women by making the workplace safe. It can simply require her to sign a waiver disclaiming her right to sue if a disabled child is born as a result of reproductive hazards at the workplace.

Other countries have sought to solve the problem of reproductive hazards at the workplace through direct regulation rather than leaving the solution to the private marketplace of coerced consent. In Finland, for example, pregnant female workers are entitled to a special, paid maternity leave if the employer cannot ensure that the workplace meets a minimum level of safety for the

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[71] *Id.* at 447 (quoting the Occupational Safety and Health Review Commission in *American Cyanamid Co.*, 9 O.S.H. Cas. (BNA) 1596, 1600 (1981)).

[72] 499 U.S. 187 (1991).

fetus.[73] The European Community has adopted a directive requiring the removal of pregnant or breast feeding women from positions entailing exposure to fetal health hazards at no reduction in pay.[74]

The United States' failure to develop an acceptable solution to the problem of reproductive hazards at the workplace is symptomatic of its unwillingness to mandate any accommodations for pregnant women at the workplace. The PDA is, at most, an equal treatment model for pregnant women. They must be treated the same as similarly situated, nonpregnant employees. The PDA, therefore, imposes no duty to accommodate pregnant women if the employer does not have a policy of accommodating other workers with health or family-related problems. Thus, an employer has no responsibility to excuse a pregnant nurse from treating patients in isolation who might expose the fetus to harm, even when an accommodation could easily be accomplished that would permit the pregnant woman to continue working safely.[75] In one case involving a pregnant nurse, the plaintiff argued that a failure to modify her work assignments while pregnant would force her to choose between her job and the health of the fetus.[76] In the name of formal equality, the Eleventh Circuit found that such a choice is consistent with federal antidiscrimination law: "Based on the facts of this case, a pregnant employee, concerned about these increased risks yet still able to continue work, is faced with a difficult choice. It is precisely this choice, however difficult, that is reserved to the pregnant employee under the PDA and *Johnson Controls*."[77] In other words, United States law imposes no duty on employers to make workplaces safe for pregnant

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[73] *See* Nadine Taub, *At the Intersection of Reproductive Freedom and Gender Equality: Problems in Addressing Reproductive Hazards in the Workplace*, 6 UCLA WOMEN'S L.J. 443, 451 (1996). The United States' solution to the problem of reproductive hazards is also unthinkable in Germany. *See generally* Carol D. Rasnic, *Germany's Legal Protection for Women Workers Vis-À-Vis Illegal Employment Discrimination in the United States: A Comparative Perspective in Light of* Johnson Controls, 13 MICH. J. INT'L L. 415 (1992).

[74] *See* Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.-KENT L. REV. 1427, 1446 n.94 (1993) (citing Council Directive 92/85, art. 5, 1992 O.J. (L348) 1).

[75] *See* EEOC v. Detroit-Macomb Hosp. Corp., 952 F.2d 403, Nos. 91-1088, 91-1278, 1992 WL 6099 (6th Cir. Jan. 14, 1992); *see also* Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308 (11th Cir. 1994) (holding that the firing of a pregnant woman with gestational diabetes after she refused to treat a patient with cryptococcal meningitis, an opportunistic infection likely to be more dangerous to a fetus in utero than to a healthy adult, did not violate the PDA); Sanderson v. St. Louis Univ., 586 F. Supp. 954 (E.D. Mo. 1984) (holding that the denial of a pregnant security officer's request for light duty work during pregnancy did not violate the PDA).

[76] *See Armstrong*, 33 F.3d at 1314.

[77] *Id.* at 1316.

women, while allowing pregnant women to choose to work in environments that pose risks to the fetus. That choice is supposed to be a positive expression of our formal equality principle because, as the Eleventh Circuit noted, "Plaintiff's claims of discrimination are more accurately viewed as an effort to secure preferential treatment for pregnant employees."[78] But, of course, it is the fetus, not the pregnant woman, who requires special treatment because it is the fetus, not the pregnant woman, who will face ill-health effects from opportunistic infections.[79]

C. *Pregnancy Accommodations*

The only federal statute that applies a special accommodation principle—the Americans with Disabilities Act ("ADA")[80]—does not cover such requests by pregnant women because pregnancy is a normal, rather than disabling, condition.[81] Federal law thereby imposes no standards on the workplace to facilitate women giving birth to healthy newborns who will then, in turn, have an opportunity to obtain good care in the first year of life.[82] Because there are

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[78] *Id.*

[79] Similarly, in cases where pregnant women want to perform light duty work in order to avoid a miscarriage, they are primarily expressing concern about the health of the fetus, not their own health. Federal law offers such women no statutory entitlement to a work environment that is safe for the fetus. *See, e.g.*, Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago, 14 ADD 100 (N.D. Ill. 1996) (firing of a pregnant woman after she complained of stomach cramps when lifting heavy objects did not violate Title VII or the Americans with Disabilities Act).

[80] 42 U.S.C. §§ 12101–12213 (1994).

[81] *See* ADA Title I Interpretive Guidance, 29 CFR § 1630.2(l) Appendix ("Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments."). Courts have generally followed these ADA guidelines. *See, e.g.*, Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465 (D. Kan. 1996) (holding that a woman experiencing a normal pregnancy cannot use the ADA to request leave during her pregnancy). *But see* Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995) (arguing that the ADA should be applied to pregnant women seeking accommodations in the workplace).

[82] Some states, however, have begun to implement legislation that would provide pregnant women with more adequate choices in the workplace. For example, Connecticut law provides that:

> It shall be a discriminatory [employment] practice . . . [f]or an employer, by himself or his agent . . . to fail or refuse to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which an employee gives written notice of her pregnancy to her employer and the

no nonpregnant employees with comparable responsibilities for another's life, employers are permitted to ignore entirely the needs and interests of fetuses and newborns when setting workplace policies.

One fundamental problem with the equal treatment approach, which dominates United States caselaw on the rights of pregnant workers, is that it forces plaintiffs to engage in an impossible comparison with nonpregnant persons who face similar problems. A case that illustrates this problem is *Troupe v. May Department Stores*,[83] authored by Judge Richard Posner. The plaintiff, Kimberly Hern Troupe, was employed as a saleswoman in the women's accessories department at Lord & Taylor. Her employment record was "entirely satisfactory" until she became pregnant and began to experience what the court calls "morning sickness of unusual severity."[84] Her nausea, however, does not appear to have been limited to the morning. Even when she received an adjustment in her schedule so that she did not need to report to work until noon, she frequently reported late to work or had to leave early. She was fired the day before she was to begin her maternity leave.[85] Citing a statement by her supervisor, Troupe argued that she was fired because her employer did not want to leave her position open during her maternity leave.[86] The lower court granted the defendant's motion for summary judgment and Troupe appealed.[87] The court of appeals affirmed, concluding that she had failed to sustain a prima facie case of discrimination because she could not "find one nonpregnant employee of Lord & Taylor who had *not* been fired when about to begin a leave similar in length to hers."[88]

The tone of the *Troupe* opinion is to place all the blame on the plaintiff for her problems at work and in litigation. For example, the court explains her morning sickness by suggesting that she caused it to last until noon because

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employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus.

CONN. GEN. STAT. ANN. § 46a-60(a)(7)(E) (West 1995).

This law, however, only contemplates one type of accommodation—a temporary transfer to a suitable temporary position. As the Connecticut courts have concluded, the employer need not take any other action to accommodate the employee because the statute, quite simply, does not require it. *See* Fenn Mfg. v. Commission on Human Rights and Opportunities, No. CIV. CV 92-509435, 1994 WL 51143, at *20 (Conn. Super. Ct. Feb. 8, 1994), *aff'd*, 652 A.2d 1011 (Conn. 1995).

[83] 20 F.3d 734 (7th Cir. 1994).

[84] *Id.* at 735.

[85] *See id.* at 735-36.

[86] *See id.* at 737.

[87] *See id.* at 736.

[88] *Id.* at 739.

"she slept later under the new schedule, so that noon was 'morning' for her."[89] Of course, the court does not explain why she also had to frequently leave work early due to her nausea. Was she napping at the cosmetic counter? As for her inability to provide comparative evidence of discrimination, the court "doubt[s] that finding a comparison group would be that difficult. . . . She either did not look, or did not find."[90] But what was she supposed to find—a nonpregnant employee with a sudden record of tardiness after a nearly spotless work record who also had scheduled a lengthy leave? Other than a pregnant woman, it is hard to imagine a proper comparison. Yet, she is blamed for not looking, just as she was blamed for having nausea beyond the morning hours.[91]

The tone of the court's opinion is not surprising, given Judge Posner's stereotypical views about pregnant women. In a 1989 law review article, he professed the belief that child-rearing is an area where nature dominates culture and that sex discrimination is not a likely explanation for women's depressed wages at the workplace.[92] Posner was therefore willing to assume that plaintiff Troupe's nature caused her problems at the workplace rather than discriminatory attitudes on the part of the employer.

A sympathetic economic perspective might have asked what business justification an employer could have for dismissing Troupe a day before her pregnancy leave would begin (and her tardiness would certainly end). Since she had a satisfactory work record before becoming pregnant, it is highly likely that she would have returned to work with a satisfactory work record after the completion of her pregnancy leave. If the purpose of punitive action against employees is to correct their behavior, it appears that Lord & Taylor had little cause for concern in Troupe's case. By voluntarily going to a part-time schedule and making every effort to be on time despite terrible nausea, she demonstrated that she was a devoted employee who could not afford to quit her job. But the Seventh Circuit sympathized entirely with the defendant-employer, thereby blaming Troupe for being lazy. The law and economics orientation of Judge Posner and his associates on the Seventh Circuit apparently made it impossible for them to judge the case from any perspective other than that of the employer.

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[89] *Id.* at 735.

[90] *Id.* at 739.

[91] It is also not clear why she should be compared to a tardy employee because the record suggests that the plaintiff did offer medical justifications for her lateness. Thus, under the employer's own work rules, her lateness should have been considered excused rather than unexcused. *See* Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 213 (1994).

[92] Posner, *supra* note 24, at 1315.

In fact, comparative evidence is not required in all PDA cases; direct evidence of pregnancy-related animus can also prove unlawful discrimination. Had Posner not insisted on an unreasonably narrow interpretation of the PDA, direct evidence of pregnancy animus should have gotten the case to the jury (or judge) for ultimate decision under what is termed a "mixed motives theory"—that an impermissible factor, along with an arguably permissible factor, motivated her discharge.[93] Instead, the Seventh Circuit never even considered the possibility of a mixed motives theory, pretending that the PDA only permits a finding of liability through the introduction of comparative evidence.[94]

Although the *Troupe* case is technically a termination case, it can also be seen as a pregnancy leave case. Troupe was doing her utmost to maintain paid employment until the date of her pregnancy leave (when she would most likely not be earning compensation). Her tardiness and early departures from work suggest that paid employment had become extremely difficult for her. Yet, she continued to try to work. Why? She probably needed the money, especially anticipating her increased costs and forthcoming leave of absence due to childbirth. The consequence of the discharge was to leave her without a job upon the completion of her pregnancy leave. In other words, her employer made it impossible for her to combine job security and child care. The price of her decision to take maternity leave after the birth of her child was her employment. If her termination was lawful, even the FMLA would not protect her right to return to work after an unpaid pregnancy leave.

While the Seventh Circuit has narrowly construed pregnancy discrimination cases to preclude women from receiving any mandated accommodations during their pregnancy, some Canadian courts have broadly interpreted their own comparable statutes to require accommodation. For example, in *Emrick Plastics v. Ontario*,[95] an Ontario court applied a reasonable accommodation model to a case involving a pregnant woman who sought reassignment to avoid working in an area where she would be exposed to fumes from spray paint. Applying a disparate impact model, the court concluded that a failure to accommodate pregnant women effectively excluded employment of pregnant spray painters

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[93] The mixed motives theory was developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) and later modified by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. § 2000e-2(m) (1994)). Because the Civil Rights Act of 1991 did not apply to Troupe's case, the standard from *Price Waterhouse* applied—that defendants in mixed motive cases can be absolved of liability with a showing that they would have made the same decision even if impermissible discrimination had not occurred. *See Price Waterhouse*, 490 U.S. at 250.

[94] The district court judge considered but rejected the applicability of a mixed motives theory. *See* Troupe v. May Dep't Stores, No. 92-C2605, 1993 U.S. Dist. LEXIS 7751, at *7 (N.D. Ill. June 3, 1993).

[95] [1992] 90 D.L.R. 4th 476 (Ont. Div. Ct.).

and therefore violated the rule against sex discrimination found in the Human Rights Code.[96] The court imposed on the employer the burden of justifying the failure to accommodate as reasonable and bona fide in the circumstances.[97] This result was achieved without reliance on any statutory reasonable accommodation language; it was simply an interpretation of settled case law under the Human Rights Code.[98]

In case after case in the United States, we therefore see judges who are imbued in the philosophy of law and economics rendering narrow decisions in discrimination cases that fail to protect the interests of pregnant women or their newborns. Law and economics gurus opposed the adoption of the PDA and the FMLA, and their judicial decisions reflect a total disregard for the substantive protections offered by those statutes.

III. CONCLUSION

In the United States, it is virtually unthinkable that we would mandate paid leave for pregnant women and their partners, require accommodations during pregnancy, and insist on the availability of pregnancy-related insurance benefits for all women. Yet, these kinds of benefits (plus more) are routine in Canada and Western Europe. The basic style of discourse in discussing these pregnancy-related issues in the United States is unique. United States law on pregnancy and childbirth is imbued in the tenets of laissez-faire economics—that we should solely consider the autonomy rights of corporations or adults in our society in deciding whether to mandate benefits.

In Canada and Western Europe, by contrast, the starting premise to this discussion is quite different. The needs of children both before and after birth are at the center of the discussion, although the equality rights of women and men in society are also emphasized. This focus on children, without the expectation that we will pass on all the costs of childbearing and childrearing to

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[96] *See id.* at 487 (citing Human Rights Code, 1981, R.S.O., ch. H-19, §§ 41(1)(*b*) & 42 (1990) (Can.)).

[97] *See id.*

[98] The Canadian Human Rights Act, like the Ontario Human Rights Code and the PDA, states that pregnancy-based discrimination is to be considered sex discrimination. Neither the Canadian nor the Ontario statutes contain a reasonable accommodation requirement for pregnancy or sex discrimination. *See* Canadian Human Rights Act, R.S.C., ch. H-6, § 3(2) (1991) (Can.). Canadian courts, however, have not been uniformly flexible in providing accommodations that would benefit the fetus or newborn. For example, in *Ontario Hydro and Canadian Union of Pub. Employees, Local 1000* [1992] 29 L.A.C. 4th 202 (Ont.), an arbitration panel refused to grant a man's request for paternity leave following the birth of his second child. He was expected to find paid child care for his children while his wife was incapacitated due to her delivery rather than provide that care himself. *See id.* at 208.

women and their partners, results in an entirely different set of social policies than we see in the United States. Workplace accommodations during and after pregnancy become possible not as special treatment for women but as special treatment for fetuses and newborns. Adhering to a strict laissez-faire philosophy, the United States is not simply passing on the costs of pregnancy and childbirth to parents, especially female parents, but is endangering the welfare of our children.

My point is not that we should ignore the equality interests of adult women and men, but that we should also work harder to incorporate the needs of children into those equality rights. Parenting leave is not simply about giving women a chance to recover from the physical demands of pregnancy and childbirth, but is also about facilitating the care of children following birth. Accommodating pregnant women at the workplace is not simply about protecting their right to work while pregnant, but is also about creating a workplace that is safe for fetuses. Canada and Western Europe have managed to find solutions which protect the interests of children as well as female employees. That conversation has not even begun in the United States.